IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

SECOND APPEAL NO. 151 OF 1992

Shri Amrutlal Ratanchand Pitale)
Age 41, Occ : Business, R/at)
Belbhandi Budruk, Tal.:Shrigonda).. Appellant.
District : Ahmednagar.)..(Orig.Plaintiff)

Versus

1) Nagnath Ganpati Chavan,)
since deceased through his)
heirs & legal representatives)
1(a) Sundarabai W/o Nagnath)
Chavan;)
1(b) Chandrakant S/o Nagnath)
Chavan;)
1(c) Anil S/o Nagnath Chavan)
1(d) Baby D/o Nagnath Chavan)
All adults R/a Bhosle Chowk,)
Nr. Chitra Talkies, At Post)
& Taluka Barshi, Dist.Solapur)
1(e) Sou. Ratna Kuber Pharkande)
1(f) Sou. Shalini Arjun Kadam)
Both Adults, R/a Marathi)
School, At & Post Akluj,)

Tal. Malshiras, Dist.)
Solapur.)
2) Sonabai Dattraya Chavan)
since deceased through her)
heirs & legal representatives)
2(a) Deepak Sukhdev Mandve)
Age : 30, Occ: Service.)
2(b) Subash Bhagwat Mandve)
Age : 25, Occ: Service.)
2(c) Smt. Vimal Bhagwat Shelar)
Age : 35, Occ: Household)
2(d) Kamal Vidhyadhar Jadhav)
Age:32, Occ: Household)
2(e) Kasturbai Balasaheb Nagtilak)
since deceased, through her)
LRs & Heirs.)
2(e-i) Balasaheb Kaka Nagtilak)
Age: 45, Occ: Nil.)
2(e-ii) Kun.Babay Balasaheb)
Nagtilak, Age: 5,)
(Minor through her)
natural guardian 2(e-i))
2(e-iii) Kun.Jayeshree Balasaheb)
Nagtilak, Age: 3,)
(Minor through her)

natural guardian 2(e-i))
All abovenamed 2(a) to 2(e))
(iii) are R/o. C. S. No.2556)
(A), Cornel Bhosle Chowk,)
Chitra Talkies Road, Barshi.)

3) Krishnabai Narayan Chavan,)
Age: 51, Occ:& Residence -do-)

4) Indrayanibai Digambar Chavan,)
Age:59,Occ:& Residing -do-)

5) Sundarabai Nagnath Chavan,)
Age: 58, Occ:& Residence -do-)

6) Sukhdeo Rangnath Mundwe,)
Age: 68, Business, of - do -)

7) Shivshakti Transport)
through its present proprie-)
tor Uttraeswar Balvant Sopal)
Age: 50, Occ: Business,)
R/o. C.S.No. 2556(A), Cornel)
Bhosle Chowk, Chitra Talkies)
Road, Barshi. ....)

8) Bashir Ibrahim Kazi, Age 68,)
Business of - do -)
(Deleted))

9) Manik Dattu Kohale, Age: 42)
Barber of - do -)

10)Govind Pralhad Debbadwar, Age)
35, Kirana Dukan of - do -)
11)Macchindra Vithal Chandane,)
Age:43,Bicycle Shop of -do-)
12)Ganpat Yeshwant Thobare,)
Age:48,Barber, C.T.S. No.2556)
of - do -)
13)Goverdhan Krishnath Nalwade,)
Age: 41, Kirana Dukan of -do-)
14) M.T.Ghodake & P.B.Kadam,)
since deceased through his)
heirs and LRs.)
14-a) Deepak M. Ghodke,)
Age:38, Occ: Restaurant,)
14-b) Pandurang M. Ghodke,)
Age:29, Occ: Restaurant,)
Both 14(a) & 14 (b))
R/a C.S. No. 2556 (A),)
Cornel Bhosle Chowk,)
Chitra Talkies Road,Barshi)
15) R. K. Gondkar, Age 48,)
Tailor of - do -)
(Deleted))
16) Sidram Ambadas Koli, Age 43,)... Respondents.
Pan Shop of - do -)..(Orig.Defendants)

Mr. C. M.Kothari for the Appellants.

Mr. R. S. Khadapkar with Mr. R. G. Ketkar for Respondent Nos.3 to 6.

Mr. G. S. Godbole for Respondent Nos.9, 10, and 12 to 14.

Respondent Nos.1A to 1F, 2A to 2D, 7, 14-A and 14-B are absent though served.

CORAM : ANOOP V. MOHTA, J.
DATED : 16TH DECEMBER, 2005.

J U D G E M E N T :

The present appeal is arising out of the Regular Civil Suit No. 228 of 1978 between the same parties for partition. By an order dated 4th August, 1983 the said suit filed by the appellant was partly decreed, whereby, it was declared that the plaintiff would be entitled to the partition of his 2/3rd share in the properties in question. Consequential orders were also passed against the original defendant Nos.7 to 16. Therefore, the appellant preferred Civil Appeal No. 762 of 1983 and respondent Nos.1 to 6 preferred Civil Appeal No. 785 of 1983. The lower appellate court by the impugned judgment and order dated 21st December, 1990 dismissed both the appeals, however, modified the trial court’s judgment and order and thereby, declared that the appellant / plaintiff is

entitled for the partition and separate possession of the suit properties described in paragraphs 1,2 and 3 of the plaint to the extent of 2/3rd share. It was further observed that while effecting partition, a portion occupied by defendant Nos.2 to 16 as far as possible be allotted to the share of defendant Nos.2 to 5 subject to the extent of their share. The preliminary decree was, accordingly, ordered to be drawn. Being aggrieved by the said judgment, the appellant preferred the present Second Appeal and the respondent Nos.1 to 6 preferred Second Appeal No. 565 of 1991 in this Court.

2. The suit property bearing City Survey No. 2556A described in the plaint, originally owned by one Kavathekar family amongst several other immovable properties. On 29th August, 1954 by a partition deed, Exhibit 95, Kavathekar (3 brothers) effected a partition. However, the suit property remained undivided for the debt of the joint family. Sometime in the year 1955 Regular Civil Suit No.320 of 1955 was filed by the appellant’s predecessors against Kavathekar joint family for the debt due from the joint family. Sometime in the year 1957, a Regular Civil Suit No. 313 of 1957 was filed by one Shankar

Zadbuke against Vishwanath Annarao Kavathekar, a proprietor of shop Harbhaji Tukaram Kavathekar. On 15th July, 1958 a compromise decree was passed. There was no specific charge created of any of the joint family properties securing the debt. On 21st August, 1958 in Regular Civil Suit No. 320 of 1955, as referred above, another compromise decree was passed and charge was created on the suit property in the said decree. Sometime in the year 1961, a regular Darkhast No. 384 of 1961 was filed in a regular Civil Suit No. 313 of 1957. A portion of the suit property was attached in the said execution and sold in the auction. Respondent No.1 purchased the said auctioned property. Admittedly, there was no document supporting the same and there was no sale certificate in this proceedings.

3. Sometime in the year 1967, regular Darkhast No. 358 of 1967 was filed by the appellant's predecessor for execution of the compromise decree in regular Civil Suit No. 320 of 1955. On 26th August, 1967 the suit property was purchased by the appellant / original plaintiff - decree holder in the court auction. On 27th September, 1967 the court auction was confirmed. On 27th June, 1968 the sale

certificate was also issued. On 25th September, 1968 the possession of the suit property was taken from respondent Nos.1 to 6 and the appellant has been in possession through the court since then.

4. On 5th June, 1978 the appellant filed regular Civil Suit No. 228 of 1978 against the respondents, praying for actual physical possession of the suit property described in plaint from original defendant Nos.1 to 6 and also claimed possession from original defendant Nos.7 to 16. In the alternative, actual physical possession of 15/16 part of the suit property described in the plaint was prayed alongwith prayer for mesne profit and costs. On 4th August, 1983 the said suit was partly decreed by the Civil Judge, Junior Division, Barshi (trial court) and allowed alternate prayer of partition and accordingly 2/3rd share in the property has been granted. The mesne profit was disallowed. Sometime in the year 1983, Civil Appeal No. 762 of 1983 was filed by the appellant / plaintiff and Civil Appeal No. 785 of 1983 was filed by the respondents challenging the trial court decree. By common order dated 21st December, 1990 both the said appeals were dismissed with slight modification in the trial court decree.

The respondents, therefore, preferred Second Appeal No. 565 of 1991 in this court which was dismissed on 26th July, 1995 as it was against the concurrent finding of fact. The appellant also preferred the present appeal on 30th March, 1991.

5. Heard learned Counsel for the parties. In view of the dismissal of the Second Appeal No. 565 of 1991 filed by original defendant Nos.1 to 6 against whom the suit filed by the appellant was allowed, being the main contestants and the same has been confirmed by the lower appellate court by the impugned judgment with slight modification by observing that the plaintiff is entitled to the equitable partition of the suit property to the extent of their 2/3rd share in the suit property. The lower appellate court further confirmed the same by observing that the original defendant Nos.2 to 5 had obtained a valid title on purchase of suit property from defendant No.1 to the extent of 1/3rd share. The case of defendant Nos.1 to 5 of adverse possession was rejected. Other defendant Nos. 7, 9, 12 to 16 have been declared to retain possession as tenants. The courts have also confirmed that the property purchased by defendant No.1 in Regular Darkhast No. 384 of 1961 was valid

and binding on plaintiff to the extent of 1/3rd share. Both the courts, therefore, concurrently granted decree in favour of the appellant / plaintiff to the extent of 2/3rd share in the suit property. The original defendant Nos.7 to 16 are in occupation of the respective premises before purchased by the appellant / plaintiff in the year 1967. In this background, I am of the view that there is no reason now to interfere in the concurrent findings arrived at by both the courts and specially in the present case at the instance of contesting original defendant Nos.1 to 6, whose appeal itself was dismissed in the year 1995. It is to be noted here that the present appeal was admitted on 9th April, 1992 with observation that it to be heard along with Second Appeal No. 565 of 1991 as at the relevant time the said second appeal was also pending. In view of this there is no substantial question of law as such now borne out from the record as contended by the learned Counsel appearing for the appellant.

6. Taking this background into account, the substantial question of law as raised and/or additional question of law as sought to be raised in the appeal need no further answer in view of the fact

that appeal filed by the contesting defendants itself was dismissed. In the result, the finding given by the courts below attains its finality. All the Issues are answered and considered by the courts below rightly. Therefore, in view of the finality as attained by the impugned judgment because of the dismissal of the appeal filed by the contesting respondents, I am not inclined to interfere with the concurrent finding of fact arrived at by the courts below now at the instance of the plaintiff at this stage of the proceedings. In the result, the question of law as framed in the present matter while admitting the second appeal i.e. ground Nos.1,3 and 4 can also be answered negatively. Hence, the following order :

(1) The judgment and order passed by both the courts below are correct and maintained.

(2) The auction purchase by defendant No.1 was valid and binding to the extent of 1/3rd share as observed by both the courts below.

(3) Both the courts are justified in holding that the plaintiff is entitled to 2/3rd

share in the suit property.

(4) Second Appeal is dismissed, with no order as to costs.

Sd/-

(ANOOP V. MOHTA, J.)